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No. 04-1170

IN THE

Supreme Court of the United States

KANSAS,

Petitioner,

v.

MICHAEL LEE MARSH II,

Respondent.

ON WRIT OF CERTIORARI TO THE KANSAS SUPREME COURT

BRIEF OF THE STATES OF ARIZONA, ALABAMA, COLORADO, GEORGIA, IDAHO, LOUISIANA, MISSISSIPPI, MONTANA, NEVADA, SOUTH CAROLINA, SOUTH DAKOTA, TENNESSEE, TEXAS, VIRGINIA AND WASHINGTON AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

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QUESTION PRESENTED

Amici will address only the substantive question presented in this case, i.e., whether it violates the Eighth Amendment for a State capital-sentencing statute to allow the imposition of the death penalty when the sentencer determines that the mitigating and aggravating evidence is in equipoise.

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INTERESTS OF AMICI CURIAE

Amici States strongly oppose the effort by the Kansas Supreme Court, under the guise of the Eighth Amendment, to increase judicial regulation of the process by which the States determine whether to impose the death penalty on defendants found guilty of capital murder. As this Court has repeatedly recognized, the organization and management of capital sentencing processes is a core aspect of state sovereignty, and review of those procedures under the federal Constitution should therefore be "quite deferential." *Tuilaepa* v. *California*, 512 U.S. 967, 973 (1994).

The Eighth Amendment theory adopted by the Kansas Supreme Court, however, would cast serious doubt upon capital sentencing procedures in numerous states besides Kansas. Most obviously, the Kansas Supreme Court's requirement that the sentencer reject the death penalty if it finds the aggravating and mitigating in equipoise would invalidate sentencing procedures in States like *amicus* Arizona. Arizona places on the defendant the burden of proving that mitigating circumstances are sufficiently substantial to warrant leniency, a burden the Arizona Supreme Court has interpreted to require a showing that the mitigating circumstances outweigh the aggravating circumstances. *State v. Walton*, 159 Ariz. 571, 769 P.2d 1017 (1989), *aff'd*, 497 U.S. 639 (1990), *overruled, in part, on other grounds*, 536 U.S. 584 (2002); *see* Ariz. Rev. Stat. Ann. § 13-703(E). Arizona has a particularly strong interest here given that this Court has previously rejected an Eighth Amendment challenge to Arizona's system based on its failure to provide the kind of "tie-breaker" procedure found necessary by the court below. *Walton* v. *Arizona*, 497 U.S. 639 (1990), *overruled, in part, on other grounds, Ring* v. *Arizona*, 536 U.S. 584 (2002).

But the implications of the lower court's theory do not end there. By focusing on whether the mitigating and aggravating

circumstances are or are not in equipoise, the decision below implicitly holds (or at least assumes) that some "weighing" of mitigating and aggravating factors is constitutionally required. For if no such weighing is constitutionally necessary, it cannot possibly matter, for Eighth Amendment purposes, how the sentencer may view those factors in comparison to each other.

Thus, if the Kansas Supreme Court's approach were followed by this Court, it would cast serious doubt upon capital sentencing procedure in numerous States--including several *amici* --that do *not* currently require any weighing of aggravating and mitigating factors. *See, e.g.*, GA. CODE ANN. § 17-10-31; LA. CODE CRIM. PROC. ANN. art. 905.3; S.C. CODE ANN. § 16-3-20; S.D. CODIFIED LAWS § 23A-27A-2; TEX. PENAL CODE ANN. § 12.31; VA. CODE ANN. § 19.2-264.2; WASH REV. CODE § 10.95.070. Indeed, if the Court agrees with the lower court's conclusion that the Eighth Amendment forbids the death penalty when those factors are in "equipoise," the very existence of that requirement will likely require "non-weighing" States to change their capital sentencing schemes to require such weighing. And hundreds of death-row inmates who have been sentenced without such weighing will likely attack their sentences on that ground.

Amici States have a strong interest in preserving their ability to organize their capital sentencing procedures in a way that, while protecting defendants' legitimate constitutional and statutory rights, also serves the strong interests of their citizens in public safety and "[t]he interests ... of the victims whose rights [the States] must vindicate." *Johnson* v. *Texas*, 509 U.S. 350, 366 (1993). The States that do *not* currently use a "weighing" system similar to that used in Kansas have an obvious interest in preserving their ability to use procedures that they believe will better advance those purposes. On the other hand, States that currently use a system similar to Kansas' have a strong interest in preserving their systems intact, without being required to adopt the tie-

breaker procedure required by the decision below. And States with systems that currently comply with the Kansas Supreme Court's theory have a strong interest in preserving their legislatures' ability to modify their systems in the future.

FACTS

In the decision below, by a 4-3 vote, the Kansas Supreme Court held the Kansas death penalty statute facially unconstitutional under the Eighth Amendment because it provides that a defendant convicted of capital murder "shall be sentenced to death" if the jury determines that the aggravating circumstances are "not outweighed by any mitigating circumstances." Pet. App. 17a-31a (quoting Kan. Stat. Ann. § 21-4624(e)). The majority found that this effectively directs the imposition of the death penalty if the sentencer determines that the aggravating and mitigating circumstances are evenly balanced. *Id.* at 19a-20a. Relying upon its earlier decision in *State v. Kleypas*, 40 P.3d 139, 223-32 (Kan. 2001), *cert. denied*, 537 U.S. 834 (2002), the majority held that, under the Eighth Amendment, the sentencer must reject the death penalty if it believes the aggravating and mitigating circumstances are "in equipoise." Pet. App. 17a-19a.

SUMMARY OF ARGUMENT

The holding below--that the Kansas capital sentencing statute violates the Eighth Amendment because it permits the death penalty when aggravating and mitigating factors are in equipoise--rests upon an important but unstated premise. The premise is that some kind of weighing of aggravating and mitigating factors is itself required by the Eighth Amendment.

Both the holding and the premise, however, are foreclosed by a single principle reflected in decisions such as *Johnson* v. *Texas*, 509 U.S. 350 (1993). It is that the Eighth Amendment leaves it to the States to determine how, if at all, to "structure" or "channel" a sentencer's consideration of mitigating

circumstances--as long as the sentencer is "able to consider *in some manner* all of a defendant's relevant mitigating evidence." *Id.* at 359, 372-73. (emphasis added).

I. That principle clearly forecloses the assumption of the court below that the Eighth Amendment requires a sentencer to "weigh" mitigating and aggravating circumstances in some fashion. As the Court put it in *Buchanan* v. *Angelone*, 522 U.S. 269, 761 (1998), "we have never ... held that the state must affirmatively structure in a particular way the manner in which juries consider mitigating evidence." *Id.* at 761-62. And the States' discretion over the structure of their capital sentencing schemes necessarily includes whether to "weigh" such evidence against evidence of aggravating circumstances and, if so, how. As the Court held in *Blystone v. Pennsylvania*, 494 U.S. 299, 306-07 (1990), "[t]he presence of aggravating circumstances serves the purpose of limiting the class of death-eligible defendants, and the Eighth Amendment does not require that these aggravating circumstances be further refined or weighed by a jury" -- including being "weighed" against any mitigating circumstances presented by the defendant. *Accord Tuilaepa*, 512 U.S. at 980 (a "sentencer need not be instructed how to weigh any particular fact in the capital sentencing decision.") Moreover, allowing the States to choose for themselves *how* they will structure the sentencer's consideration of aggravating and mitigating circumstances comports with the language and history of the Eighth Amendment.

II. The *Johnson* principle likewise forecloses the holding of the court below that the Eighth Amendment requires a sentencer to reject the death penalty if the aggravating and mitigating circumstances are in equipoise. Again, all this Court's decisions require as to mitigating circumstances is that the sentencer be "able to consider" all relevant mitigating evidence "in some manner." 509 U.S. at 372. Just as States can satisfy that requirement without requiring any "weighing" of aggravating and mitigating circumstances, so also can they

do so without specifying precisely what the sentencer must do if, after weighing the aggravating and mitigating circumstances together, it finds that the two are equally balanced. As *Johnson*, *Buchanan* and other decisions confirm, the Eighth Amendment simply does not require more "structure" than this.

If there were any doubt about this conclusion, *Walton* eliminates it. The Arizona capital sentencing statute at issue there used a weighing provision by which death was imposed if the mitigating circumstances did not outweigh the aggravating circumstances, or if the mitigating circumstances were not "sufficiently substantial to call for leniency." Ariz.Rev.Stat.Ann. § 13-703(E). The Court began by holding that "[t]he requirement of individualized sentencing in capital cases is satisfied by allowing the jury to consider all relevant mitigating evidence." *Walton*, 497 U.S. at 652, *quoting Blystone*, 494 U.S. at 307. The Court then concluded that, "so long as a State's method of allocating the burdens of proof does not lessen the State's burden to prove every element of the offense charged ... a defendant's constitutional rights are not violated by placing on *him* the burden of proving mitigating circumstances *sufficiently substantial to call for leniency*. *Walton*, 497 U.S. at 650 (emphasis added).

Obviously, the Court's use of the phrase "sufficiently substantial to call for leniency" is equivalent to saying, in the context of Arizona's weighing system, that the mitigating circumstances are not sufficient to "outweigh" the aggravating circumstances. And that clearly implies that, if the aggravating and mitigating circumstances are in some sense "in equipoise," the sentencer is free to impose the death penalty.

ARGUMENT

As shown below in Section I, the Kansas Supreme Court was wrong to assume that the Eighth Amendment requires that a sentencer engage in some kind of weighing of mitigating and aggravating factors in determining whether to impose the death penalty. Section II shows that, even if a State chooses to adopt such a weighing procedure, the Eighth Amendment does not require that the sentencer reject the death penalty if it finds that the mitigating and aggravating factors are in equipoise.

I. Contrary to the Kansas Supreme Court's assumption, the Eighth Amendment requires no weighing of mitigating and aggravating factors.

Although this Court requires that State sentencing procedures allow mitigating factors to be *considered*, it has never placed on States a requirement that mitigation evidence be *weighed* against aggravating factors, and has held to the contrary on several occasions. To impose such a requirement would go well beyond the requirements of the Eighth Amendment under any reasonable understanding of its text and history.

A. This court has not previously required States to weigh mitigating and aggravating factors, but has instead allowed States to decide for themselves how such evidence is considered.

As this Court's death penalty jurisprudence stands today, State sentencing statutes must satisfy only two requirements. First, a sentencer's discretion to impose the death penalty "must be suitably directed and limited so as to minimize the risk of wholly arbitrary and capricious action." *Zant* v. *Stephens*, 462 U.S. 862, 874 (1983) (quoting *Gregg* v. *Georgia*, 428 U.S. 153, 189 (1976)). This step serves to "narrow" the class of defendants who are *eligible* for the

death penalty. *Tuilaepa* v. *California*, 512 U.S. 967 (1994) (noting that an aggravating circumstance "may not apply to every defendant convicted of murder; it must apply only to a subclass of defendants convicted of a murder"). Second, a sentencer must be allowed to consider, and give effect to, any mitigating evidence. *Buchanan* v. *Angelone*, 522 U.S. 269, 276 (1998); *Tuilaepa*, 512 U.S. at 972. That is, it must be given discretion to make an "individualized determination" about the appropriate punishment based on the defendant's "character" and "record." *Johnson*, 509 U.S. at 360; *Tuilaepa*, 512 U.S. at 972.

This Court, however, has been careful not to create additional restrictions on the States' legitimate interests in structuring their death penalty statutes to reflect their unique policies and traditions. As the Court put it in *Buchanan*, "we have never ... held that the state must affirmatively structure in a particular way the manner in which juries consider mitigating evidence." 522 U.S. at 276.

That principle, moreover, necessarily includes whether to "weigh" such evidence against evidence of aggravating circumstances and, if so, how. As the Court put it in *Blystone v. Pennsylvania*, 494 U.S. 299, 306-07 (1990), "[t]he presence of aggravating circumstances serves the purpose of limiting the class of death-eligible defendants, and the Eighth Amendment does not require that these aggravating circumstances be further refined or weighed by a jury." See also *Tuilaepa*, 512 U.S. at 979 (a "sentencer need not be instructed how to weigh any particular fact in the capital sentencing decision.").

In *Zant*, for example, the Court examined Georgia's capital punishment statute, which allowed a jury to impose the death penalty if it found, beyond a reasonable doubt, that one of several aggravating factors existed. 462 U.S. at 865-66. The jury in that case also was instructed that it could consider "all of the evidence received during the trial as well as all facts and circumstances presented in . . . mitigation." *Id.*

However, as the Court made clear, the jury had complete discretion to withhold the death penalty based on mitigation factors, regardless of the weight it accorded to such evidence. *Id.* at 871. "In Georgia, unlike some other States, the jury is not instructed . . . to balance aggravating against mitigating circumstances pursuant to any special standard." *Id.* at 873-74 (footnote omitted). But the Court rejected the argument that Georgia violated the Eighth Amendment by giving the jury "unbridled discretion" whether to consider mitigating evidence after determining that a defendant was eligible for the death penalty. It found Georgia's statute constitutional "even though it clearly did not channel the jury's discretion by enunciating specific standards to guide the jury's consideration of aggravating and mitigating circumstances." *Id.* at 875 (citing *Gregg* v. *Georgia*, 428 U.S. 153, 196-97 (1976), and refusing to overrule that decision which also upheld Georgia's sentencing statute).

More recently, in *Buchanan* v. *Angelone*, the Court examined Virginia's capital sentencing statute which, like Georgia's, required the State to prove beyond a reasonable doubt that at least one aggravating factor existed. 522 U.S. at 272. Under that system, the jury was simply instructed that it "may fix the punishment of the Defendant at death or if you believe from all the evidence that the death penalty is not justified, then you shall fix the punishment of the Defendant at life imprisonment." *Id.* at 272-73. There was no explicit instruction on mitigating factors. Yet the Court rejected the defendant's argument that the trial court violated the Eighth Amendment by failing to "instruct the jury on its obligation and authority to consider mitigating evidence, and on particular mitigating factors deemed relevant by the State." *Id.* at 275. The Court concluded that the State's procedures comported with the Eighth Amendment because the State permitted the jury to consider all mitigating evidence and did not "constrain the manner in which the jury was able to give effect" to such factors. *Id.* at 277.

The principle underlying all these decisions is that the Eighth Amendment leaves it to the States to determine how, if at all, to "structure" or "channel" a sentencer's consideration of mitigating circumstances. At one extreme, "the sentencer may be given 'unbridled discretion in determining whether the death penalty should be imposed after it has found that the defendant is a member of the class made eligible for that penalty.'" *Tuilaepa*, 512 U.S. at 979-980 (quoting *Zant*, 426 U.S. at 875). Alternatively, the State can choose to channel the sentencer's discretion by, for example, specifying the statutory criteria to which a particular mitigating factor is relevant. *Johnson*, 509 U.S. at 372. Under this Court's decisions, all the Eighth Amendment requires is "that a jury be able to consider *in some manner* all of a defendant's relevant mitigating evidence." *Id.* (emphasis added).

If, in the face of this authority, this Court were to rule in favor of the respondent and require the kind of "equipoise" procedure that the Kansas Supreme Court did, it would imply that a weighing of mitigating and aggravating factors is constitutionally required and, in the process, cast doubt on the vast majority of State death penalty statutes that do not require such balancing. At least 10 of the 35 States that have adopted capital punishment do not require any weighing of mitigating and aggravating circumstances. *Thirty-Second Annual Review of Criminal Procedure*, 91 GEO. L. J. 717, 728 n.2259 (2003); Ingrid A. Holewinski, *"Inherently Arbitrary and Capricious": An Empirical Analysis of Variations Among State Death Penalty Statutes*, 12 CORNELL J.L. & PUB. POL'Y 231, 239 (2003); Russell Dean Covey, *Exorcizing Weschsler's Ghost: The Influence of the Model Penal Code on Death Penalty Sentencing Jurisprudence*, 31 HASTINGS CONST. L.Q. 189, 222 n.175 (2004).[1]

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[1] The lists of "non-weighing" states compiled in these law review articles are not entirely consistent with each other, as a few statutes can be categorized differently depending on the definition of weighing. But there is no doubt that a substantial number of States currently require no

Adoption of the Kansas Supreme Court's assumption would therefore force these States to re-write their capital punishment procedures and would place into question numerous death penalty sentences across the country. As we have shown, however, that assumption is flatly contrary to the principle that the Eighth Amendment leaves to the States the authority to determine how, if at all, to structure the sentencer's consideration of mitigating and aggravating circumstances, as long as the sentencer is allowed to consider all mitigating evidence "in some manner." *Id.*

B. In its original meaning, the Eighth Amendment did not require any consideration of mitigating evidence and, hence, any balancing of that evidence against aggravating factors.

An additional reason not to impose a balancing or weighing requirement is that no reasonable reading of the text and history of the Eighth Amendment supports it. We recount that history briefly, not to call for the overruling of any of this Court's prior decisions, but to urge the Court not to read those precedents as imposing *additional* restrictions on the States' management of their sentencing processes.

1. The Eighth Amendment, as originally understood, had no bearing at all on the process by which States determine what punishments to impose. The Eighth Amendment in its entirety reads: "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." Thus, the text speaks only to the *end result* of a prosecution, i.e., the punishment actually imposed, and not to the *process* by which the punishment is determined. See, *e.g.*, *Harmelin* v. *Michigan*, 501 U.S. 957, 978 (1991) (opinion of

weighing of aggravating and mitigating circumstances. Moreover, states such as South Dakota, though listed as weighing states in some of the aforementioned law review articles, in fact have non-weighing statutes. *See* S.D. CODIFIED LAWS §§ 23A-27A-2—23A-27A-4.

Scalia, J., in which Rehnquist, C.J., joined) (providing a detailed analysis of the evidence reflecting the original intent of the Cruel and Unusual Punishments clause and concluding that the clause merely prohibits certain "*modes* of punishment") (emphasis in original).[2]

The historical evidence confirms what the text clearly shows, i.e., that it was only the method or mode of punishment, and nothing more, that the Eighth Amendment was intended to limit. Adopted verbatim from the English Bill of Rights of 1689, the Cruel and Unusual Punishments

[2] *See also Roper* v. *Simmons*, 125 S. Ct. 1183, 1218 n.1 (2005) (Scalia, J., dissenting); *Weems* v. *United States*, 217 U.S. 349, 383-411 (1910) (White, J., dissenting); Jeffrey D. Bukowski, *The Eighth Amendment and Original Intent: Applying the Prohibition Against Cruel and Unusual Punishments to Prison Deprivation Cases is Not Beyond the Bounds of History and Precedent*, 99 DICK. L. REV. 419, 421-422 (1995) ("There is little doubt that the original drafters of the Eighth Amendment's prohibition against cruel and unusual punishments were primarily concerned with the use of tortures and other barbarous methods of punishment."); Anthony F. Granucci, *"Nor Cruel and Unusual Punishments Inflicted:" The Original Meaning*, 57 CAL. L. REV. 839, 840-42 (1969) ("Expressions in the first congress confirm the view that the cruel and unusual punishments clause was directed at prohibiting certain methods of punishment."); Note, *The Cruel and Unusual Punishments Clause and the Substantive Criminal Law*, 79 Harv. L. Rev. 635, 636-37 (1966) ("it was unusual cruelty in the *method* of punishment that was condemned") (emphasis in original).

Even assuming *arguendo* that the Cruel and Unusual Punishments clause also contains a proportionality guarantee, i.e., that the punishment be proportional to the crime, such a guarantee would not necessitate the consideration of mitigating factors at a post-conviction penalty phase. The crime to which a punishment would be made proportional is the act which the defendant is declared to have committed when he is convicted during the *trial* phase. Mitigating factors presented *after* conviction are, by their very nature, not for consideration in the conviction phase, and thus would have no relevance to whether the punishment is proportional to the crime itself. *See California* v. *Ramos*, 463 U.S. 992, 1007-08 (1983) (explaining that the penalty phase, unlike the determination of guilt, allows for "countless considerations" to determine if the punishment is appropriate to the individual defendant rather than whether the punishment is appropriate to the crime).

clause was first introduced into the Virginia state constitution by George Mason in 1776. Granucci, *supra*, at 839-40. The clause was eventually adopted by eight other states and included in the federal government's Northwest Ordinance of 1787 before it became the Eighth Amendment in 1791. *Id.* at 840.

Before the proposal or adoption of the federal Bill of Rights, however, the absence of any limitation on Congress' punishment-creating ability became a source of discussion during the debates over the ratification of the Constitution. For example, during the Massachusetts convention of January, 1788, a certain Mr. Holmes asked:

> What gives an additional glare of horror to these gloomy circumstances is the consideration that Congress have to ascertain, point out, and determine, what kind of punishments shall be inflicted on persons convicted of crimes. They are nowhere restrained from inventing the most cruel and unheard-of punishments, and annexing them to crimes; and there is no constitutional check on them, but that *racks* and *gibbets* may be amongst the most mild instruments of their discipline.

2 J. ELLIOT, THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION 111 (2d ed. 1881) (emphasis in original). That statement was obviously an objection to the lack of limits on the *methods* by which Congress might impose punishments, not to the lack of *procedures* by which to determine which method of punishment was appropriate.

Similarly, during the Virginia ratification convention, Patrick Henry expressed concern whether the new constitution "would not admit of tortures, or cruel and barbarous punishment." 3 ELLIOT, *supra*, at 447-48. He apparently thought the Virginia Bill of Rights, adopted in 1776, lacked such a protection as well. To this George Mason replied that

> the worthy gentleman was mistaken in his assertion that the [Virginia] bill of rights did not prohibit torture; for... [a]nother clause of the bill of rights provided that no cruel and unusual punishments shall be inflicted; therefore, torture was included in the prohibition.

Id. at 452 (emphasis added). The provision that was later proposed as the Eighth Amendment, of course, mirrored the same provision in the Virginia Bill of Rights. Thus, as Chief Justice Burger observed, "The records of the debates in several of the state conventions called to ratify the 1789 draft Constitution submitted prior to the addition of the Bill of Rights show that *the Framers' exclusive concern was the absence of any ban on tortures*." *Furman* v. *Georgia*, 408 U.S. 238, 377 (1972) (Burger, C.J., dissenting) (emphasis added).

The attitudes expressed by the first Congress also are persuasive evidence of the original understanding of the Constitution's provisions. *Harmelin*, 501 U.S. at 980 (opinion of Scalia, J.); *Marsh* v. *Chambers*, 463 U.S. 783, 788-790 (1983). Here, too, the emphasis was on prohibiting certain methods of punishment:

> Mr. LIVERMORE. -- The [Eighth Amendment] seems to express a great deal of humanity, on which account I have no objection to it; but as it seems to have no meaning in it, I do not think it necessary. . . . No cruel and unusual punishment is to be inflicted; it is sometimes necessary to hang a man, villains often deserve whipping, and perhaps having their ears cut off; but are we in future to be prevented from inflicting these punishments because they are cruel? If a more lenient mode of correcting vice and deterring others from the commission of it could be invented, it would be very prudent in the Legislature to adopt it; but until we have some security that this will be done, we ought not to be restrained from making necessary laws by any declaration of this kind.

1 ANNALS OF CONG. 782-83 (1789). Despite such objections to the wisdom of the amendment (focused as it was on methods of punishment), "it was agreed to by a considerable majority." *Id.*[3]

Early cases interpreting the Eighth Amendment also focused on the mode or method of punishment. *Furman*, 408 U.S. at 421-22 (Powell, J., dissenting). For example, in *In re Kemmler*, 136 U.S. 436, 444, 447 (1890), Chief Justice Fuller, speaking for a unanimous Court, explained that "[p]unishments are cruel when they involve torture or a lingering death; but the punishment of death is not cruel, within the meaning of that word as used in the Constitution. It implies there something inhuman and barbarous, something more than the mere extinguishment of life." 136 U.S. at 447. Thus, "[t]he Court drew a clear line between the penalty itself and the mode of its execution." *Furman*, 408 U.S. at 422 (Powell, J., dissenting). See also *Wilkerson* v. *Utah*, 99 U.S. 130, 137 (1879); *Harmelin*, 501 U.S. at 982-84 (citing, *inter alia*, *Aldridge* v. *Commonwealth*, 4 Va. 447, 449-50 (1824)).

In short, as the Chief Justice has pointed out, under the original understanding, "the prohibition against cruel and unusual punishment contained in the Eighth Amendment [asks only whether t]he *punishment* . . . is . . . cruel and unusual ..." *Woodson* v. *North Carolina*, 428 U.S. 280, 323-24 (1976) (Rehnquist, J., dissenting). In other words, "[t]he prohibition of the Eighth Amendment relates to the character of the punishment, and not to the process by which it is imposed." *Gardner* v. *Florida*, 430 U.S. 349, 371 (1977)

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[3] Moreover, "[t]he early commentary on the Clause . . . again indicates that it was designed to outlaw particular *modes* of punishment." *Harmelin*, 501 U.S. at 981 (opinion of Scalia, J.) (emphasis in original) (citing J. BAYARD, A BRIEF EXPOSITION OF THE CONSTITUTION OF THE UNITED STATES 154 (2d ed. 1840); 3 J. STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES § 1896 (1833); B. OLIVER, THE RIGHTS OF AN AMERICAN CITIZEN 186 (1832); 2 J. KENT, COMMENTARIES ON AMERICAN LAW 10-11 (1827)).

(Rehnquist, J., dissenting). *See also Harmelin*, 501 U.S. at 965-985 (opinion of Scalia, J.).

2. This Court departed to some extent from that reading of the Eighth Amendment in *Furman* v. *Georgia*, 408 U.S. 238 (1972), which held that States must adopt *some* procedures sufficient to ensure a narrowing of the class of persons convicted of murder who are eligible for the death penalty. Specifically, the Court deemed unconstitutional capital sentencing procedures in Georgia and Texas that placed complete discretion in juries to impose death for various crimes. *Id.* at 240 (Douglas, J., concurring). That discretion was characterized as giving rise to "cruel and unusual punishment" because of the arbitrariness such discretion created. Justice Stewart reasoned:

> These death sentences are cruel and unusual in the same way that being struck by lightening is cruel and unusual. For, of all the people convicted of rapes and murders in 1967 and 1968, many just as reprehensible as these, the petitioners are among a capriciously selected random handful upon whom the sentence of death has in fact been imposed. . . . I simply conclude that the Eighth and Fourteenth Amendments cannot tolerate the infliction of a sentence of death under legal systems that permit this unique penalty to be so wantonly and so freakishly imposed.

Id. at 309-10 (footnotes omitted) (concurring opinion). *See also id.* at 313 (White, J., concurring) (stating that the "death penalty is exacted with great infrequency even for the most atrocious crimes and that there is no meaningful basis for distinguishing the few cases in which it is imposed from the many cases in which it is not").

Neither the language and history of the Eighth Amendment nor the rationale underlying *Furman*, however, suggests that the phrase "cruel and unusual punishment" requires that mitigating factors be part of the sentencing process. As

Justice Scalia noted in *Walton*, the phrase "unusual punishment" can reasonably be read to mean "a traditional form of punishment that is rarely imposed." 497 U.S. at 670 (concurring in part and concurring in the judgment). But under this reading of the text, States could satisfy any procedural demands the Amendment may impose, and satisfy *Furman*, merely by limiting or "narrowing" the death penalty to a well-defined set of crimes. *Roberts* v. *Louisiana*, 428 U.S. 325, 339 (1976) (White, Burger, Blackmun, and Rehnquist, JJ., dissenting) (finding a mandatory death penalty statute to be consistent with the Eighth Amendment); *Woodson* v. *North Carolina*, 428 U.S. 280, 313 (1976) (Rehnquist, J., dissenting) (same). *See also Graham* v. *Collins*, 506 U.S. 461, 487 (1993) (Thomas, J., concurring) (noting that a "mandatory death penalty scheme [is] a perfectly reasonable legislative response to the concerns expressed in *Furman*); *Walton*, 497 U.S. at 671 (Scalia, J., concurring in part and concurring in the judgment) (stating that a mandatory death sentence is not "unusual" because it would not be "rarely" imposed).

In short, even under a fairly expansive reading of the Eighth Amendment, the "'narrowing' requirement" is the "only special capital sentencing procedure that the Eighth Amendment demands." *Espinosa* v. *Florida*, 505 U.S. 1079, 1083 (1992) (Scalia, J., dissenting). It follows that, under this reading, the Eighth Amendment "does not require any consideration of mitigating evidence." *Sochor* v. *Florida*, 504 U.S. 527, 553-554 (1992) (Scalia, J., concurring in part and dissenting in part).

Amici States recognize that, since *Furman,* a majority of this Court has expanded its view of the Eighth Amendment to require that juries also consider mitigating evidence. *E.g.*, *Lockett v. Ohio*, 438 U.S. 586, 604 (1978); *Eddings* v. *Oklahoma,* 455 U.S. 104, 113-115 (1982). This case does not require the Court to reconsider that conclusion. If this Court affirms the decision below, however, and extends this line of

cases to require that mitigation evidence be weighed against aggravating factors, it would further remove its death penalty jurisprudence from the Amendment's original understanding as well as the interpretation of the Amendment in *Furman*.

Such a dramatic extension of the *Lockett-Eddings* line of cases, moreover, would upset the careful balance this Court has struck between protecting the constitutional rights of defendants and recognizing the States' important interests in maintaining a right to manage their own affairs. As noted in *Johnson* v. *Texas*, States should be "free to structure and shape consideration of mitigating evidence 'in an effort to achieve a more rational and equitable administration of the death penalty.'" 509 U.S. at 362 (citing *Boyde* v. *California*, 494 U.S. 370, 377 (1990)). Upholding the Kansas Supreme Court's decision, and thereby imposing a "weighing" requirement on all the States, would render this aspect of State sovereignty virtually meaningless.

II. If a State chooses to engage in a weighing of mitigating and aggravating factors, nothing in the Eighth Amendment or this Court's decisions requires a state also to specify that the sentencer must reject capital punishment if it believes the aggravating and mitigating circumstances are "in equipoise."

Some States, like Kansas and Arizona, have of course chosen to have sentencing juries weigh aggravating and mitigating circumstances in some fashion. But that choice does not mean the State must then require that a sentencer reject the death penalty if it finds that the aggravating and mitigating factors are in some sense in equipoise. Indeed, if, as we have already established, the Eighth Amendment does not require weighing in the first instance, it cannot require that aggravation somehow "outweigh" mitigation.

Petitioner's brief provides a comprehensive explanation of why the Kansas Supreme Court's analysis of this point was incorrect, and we will not repeat that analysis here. However,

we wish to emphasize two dispositive points. First, this issue is controlled by such decisions as *Johnson*, which make clear that the Eighth Amendment imposes no procedural requirements as to the consideration of mitigating evidence other than that the jury must be allowed to consider it as a basis for rejecting the death penalty. And second, this Court's decision in *Walton*, which is a special case of the *Johnson* principle, makes crystal clear that the Kansas capital sentencing system is not unconstitutional by virtue of its failure to require the sort of "equipoise" procedure that the Kansas Supreme Court thought necessary to comply with the Eighth Amendment.

A. This case is controlled by the general principle articulated in *Johnson* that the Eighth Amendment leaves the States with discretion to structure the consideration of mitigating circumstances in any way that allows a jury to consider those circumstances "in some manner."

As discussed earlier, the issue of whether a State must have the sentencer conduct a weighing of mitigating evidence against aggravating evidence is controlled by the principle applied in such decisions as *Johnson, Tuilaepa,* and *Buchanan*: under the Eighth Amendment a State need not "structure in a particular way the manner in which juries consider mitigating evidence" (522 U.S. at 276) as long as the jury is able to consider that evidence "in some manner." *Johnson*, 509 U.S. at 372. That principle is equally dispositive of the issue whether the Eighth Amendment also requires rejection of the death penalty if the sentencer finds that the aggravating and mitigating circumstances are "in equipoise."

The principle articulated in these decisions is by no means an aberration in this Court's jurisprudence. Several years prior to *Johnson,* the Court in *Zant* had held that "the Constitution does not require a State to adopt specific

standards for instructing the jury in its consideration of aggravating and mitigating circumstances." 462 U.S. at 890. And more recently, in *Franklin* v. *Lynaugh*, 487 U.S. 164, 179 (1988), the Court noted that "we have never held that a specific method for *balancing* mitigating and aggravating factors in a capital sentencing proceeding is constitutionally required." These were forerunners of the general principle that a State is free to structure the sentencing proceeding in any way that allows the sentencer to "consider" the mitigating evidence "in some manner." *Johnson*, 509 U.S. at 372.

That principle, moreover, is rooted in a deeper concern about intrusion into the States' management of their capital jury trials. In keeping with that concern, the Court has repeatedly warned against "micromanagement" of State capital sentencing procedures under the Eighth Amendment. *See, e.g., Harris v. Alabama*, 513 U.S. 504, 512 (1995).

The Kansas Supreme Court flatly violated these principles in holding that the Eighth Amendment requires a capital sentencer to reject the death penalty if it finds the aggravating and mitigating circumstances in equipoise. To require such a result under the aegis of the Eighth Amendment is to require the States to structure the consideration of mitigating circumstances in a "particular way" -- i.e., in a way that results in rejection of the death penalty if the sentencer fails to find that the aggravators "outweigh" the mitigators. *Buchanan*, 522 U.S. at 276. Where it applies, such a requirement is indeed "a specific method for balancing mitigating and aggravating circumstances." *Franklin*, 487 U.S. at 179. And where the sentencer is a jury, such a requirement is also a "specific standard[] for instructing the jury in its consideration of aggravating and mitigating circumstances." *Zant,* 462 U.S. at 890. For all these reasons, such a requirement goes well beyond simply allowing the

sentencer to "consider" the mitigating circumstances "in some manner." *Johnson*, 509 U.S. at 372.[4]

B. *Walton*, which is simply an application of the *Johnson* principle, leaves no doubt as to the constitutionality of Kansas' capital sentencing scheme.

If there were any doubt as to the error of the Kansas Supreme Court's holding under the principle announced in *Johnson* and its predecessors, *Walton* eliminates it. Indeed, *Walton* can best be thought of as a specific application of the *Johnson* principle.

1. *Walton* examined the constitutionality of Arizona's capital sentencing statute, which uses a weighing provision by which death is imposed if the mitigating circumstances do not outweigh the aggravating circumstances, or if the mitigating circumstances are not "sufficiently substantial to call for leniency." Ariz.Rev.Stat.Ann. § 13-703(E). The plurality determined that this statute satisfied the narrowing requirement of the Eighth Amendment because it allowed a death sentence if the sentencer "finds one or more of the aggravating circumstances enumerated . . . and that there are

[4] As petitioner explains in detail, moreover, the Kansas Supreme Court's decision envisions a situation--a sentencer feeling that the aggravating and mitigating circumstances are in equipoise--that is extremely unlikely in practice. Indeed, that concern assumes a level of precision in sentencing deliberations that simply does not exist. Because there is no requirement that a jury give any specific weight to any particular type of mitigation, and because there is no logical way to ascribe a specific weight to any mitigating factor, a requirement that requires a precise "sum" of the combined aggravating evidence--which can then be weighed against some "sum" of the mitigation evidence--is meaningless. Even if a state were to specify that aggravation must outweigh mitigation by at least one percent, because neither mitigation nor aggravation can be specifically quantified, in reality such a standard would still mean nothing more than that the sentencer must "consider aggravation and mitigation and decide if the death penalty is warranted."

no mitigating circumstances sufficiently substantial to call for leniency." 497 U.S. at 644. The plurality thus rejected the argument that Arizona's capital sentencing statute creates an "unconstitutional presumption" of death. *Id.* at 651-52.

The Kansas Supreme Court attempted to evade the *Walton* holding by relying upon the fact that no single opinion commanded a majority of the Court. Pet. App. 21a. What the court ignored, however, is that Justice Scalia, who provided the critical fifth vote, also squarely rejected the defendant's "presumption of death" argument, albeit on different grounds. He concluded that the Arizona statute was constitutional because, in his view, the Eighth Amendment requires no consideration of mitigating circumstances at all. *Walton*, 497 U.S. at 670-73 (Scalia, J., concurring in judgment). But there is no doubt that Justice Scalia had the "presumption of death" argument in mind, inasmuch as (a) he expressly rejected the defendant's "claim that in two respects the Arizona procedure deprived the sentencer of discretion to consider all mitigating circumstances," *id.* at 674 (Scalia, J., concurring in judgment); and (b) the "presumption of death" argument was one of the two specific mitigation issues that the plurality addressed. Thus, there can be no doubt that a majority of this Court squarely addressed and rejected the "presumption of death" argument on the merits.

Moreover, as petitioner explains, it would have made no sense for the Court to avoid that issue because it was the subject of an existing conflict between the Arizona Supreme Court's decision upholding the statute in *State* v. *Walton*, 769 P.2d 1017 (Ariz. 1989), and the Ninth Circuit's decision declaring the same statute unconstitutional in *Adamson* v. *Ricketts*, 865 F.2d 1011 (9th Cir. 1988). The majority in *Adamson* had held that the statute "impermissibly places the burden on the defendant to prove the existence of mitigating circumstances sufficiently substantial to merit leniency, thereby imposing a presumption that death is the appropriate penalty." *Adamson*, 865 F.2d at 1039. Such a presumption,

according to the Ninth Circuit, hindered the "individualized consideration" of mitigating circumstances that the Eighth Amendment requires. *Id.*

The *Walton* plurality squarely rejected this argument. The Court reiterated its earlier holdings that "[t]he requirement of individualized sentencing in capital cases is satisfied by allowing the jury to consider all relevant mitigating evidence." *Walton*, 497 U.S. at 652, *quoting Blystone*, 494 U.S. at 307. The Court further noted that "[t]here is no . . . constitutional requirement of unfettered sentencing discretion in the jury," and that "States are free to structure and shape consideration of mitigating evidence 'in an effort to achieve a more rational and equitable administration of the death penalty.'" *Walton*, 497 U.S. at 652, *quoting Boyde*, 494 U.S. at 377. The Court then concluded that, "[s]o long as a State's method of allocating the burdens of proof does not lessen the State's burden to prove every element of the offense charged, ...a defendant's constitutional rights are not violated by placing on him the burden of proving mitigating circumstances *sufficiently substantial to call for leniency." Walton*, 497 U.S. at 650.

The Court's use of the phrase "sufficiently substantial to call for leniency" is equivalent to saying, in the context of Arizona's "weighing" system, that the mitigating circumstances, alone or in combination, are not sufficient to "outweigh" the aggravating circumstances. And that clearly implies that, if the aggravating and mitigating circumstances are in some sense "in equipoise," the jury is free to impose the death penalty. Thus, *Walton* squarely addressed and rejected the "presumption of death" argument relied upon by the court below.

2. . Settled principles of *stare decisis* counsel strongly against any departure from *Walton*. As a unanimous Court put it in *United States* v. *IBM*, 517 U.S. 843 (1996), *stare decisis* "promotes the evenhanded, predictable, and consistent development of legal principles, fosters reliance on judicial

decisions, and contributes to the actual and perceived integrity of the judicial process." *Id.* at 856. Thus, "[e]ven in constitutional cases, the doctrine carries such persuasive force that we have always required a departure from precedent to be supported by some 'special justification.'" *Id.*

No such "special justification" exists here. There is no evidence, for example, that *Walton* has proven unworkable. *Cf.*, *e.g.*, *id.* at 856, *Payne* v. *Tennessee*, 501 U.S. 808, 827 (1991). Moreover, although no single opinion commanded a majority in *Walton*, neither the plurality nor the concurrence can be said to have been "badly reasoned." *Id.*; *United States* v. *IBM*, 517 U.S. at 856.

On the other hand, several States have relied upon *Walton* in their decision not to require sentencing juries to reject the death penalty if they believe the aggravating and mitigating circumstances are in equipoise. Those include not only Arizona, whose capital sentencing regime was at issue in *Walton*, and Kansas, whose capital sentencing regime is at issue here, but a handful of other States as well. *See, e.g.*, COLO. REV. STAT. § 18-1.3-1201(2)(a) (2004); FLA. STAT. § 921.141(2)(b), (3)(b) (2005); MISS. CODE ANN. § 99-19-101(2)(c), (3)(c) (2005); NEV. REV. STAT. § 175.554(3) (2004); N.C. GEN. STAT. § 15A-2000(b)(2), (c)(3) (2004).[5] In

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[5] Indeed, since *Furman*, many of the "weighing" states adopted, and have long since relied upon, sentencing procedures under which a murderer must establish that mitigation outweighs aggravation to avoid a death sentence. This Court has repeatedly cited statutory language, state judicial constructions, closing arguments, and jury instructions referring to the defendant's burden to demonstrate that mitigation "outweighs" aggravation. See, *e.g.*, *Brown* v. *Payton*, -- U.S. --, 125 S. Ct. 1432, 1447 (2005) (jury instructed, "[I]f you determine that the mitigating circumstances outweigh the aggravating circumstances, you shall impose a sentence of confinement in the state prison for life without the possibility of parole."); *Wiggins* v. *Smith*, 539 U.S. 510, 537 (2003) (citing Maryland case holding that "as long as a single juror concludes that mitigating evidence outweighs aggravating evidence, the death penalty cannot be imposed"); *Bell* v. *Cone*, 535 U.S. 685, 691 (2002) (citing

addition, several courts have relied on *Walton* in rejecting the argument that the Eighth Amendment prohibits a state from placing the burden on the capital defendant to prove mitigation. *See Richmond* v. *Lewis*, 948 F.2d 1473, 1481 (9th Cir. 1990), *rev. on other grounds*, 506 U.S. 40 (1992) (rejecting claim that Arizona's statutory presumption was unconstitutional, noting that "*Walton* v. *Arizona* specifically addressed and rejected" the claim); *State* v. *Ross*, 646 A.2d 1318, 1352 (Conn. 1994); *State* v. *Hoffman*, 851 P.2d 934, 943 (Idaho 1993).[6]

As this Court observed in *Payne*, the demands of *stare decisis* are "at their acme . . . where reliance interests are involved." 501 U.S. at 828. Those demands acquire even greater force in the capital punishment context because, as the Court noted in *Johnson*, "[t]he interests of the State[s] . . . and of the victims whose rights [they] must vindicate, ought not to be turned aside when the State relies upon an interpretation of the Eighth Amendment approved by this Court." 509 U.S. at 366. For all these reasons, the Court should adhere to *Walton*.

Tennessee law providing that "a death sentence was required if the jury found unanimously that the State proved beyond a reasonable doubt the existence of at least one statutory aggravating circumstance that was not outweighed by any mitigating circumstance.").

[6] Courts have also rejected the corresponding argument that the Constitution requires a presumption of life at the penalty phase of a capital sentencing. *Smallwood* v. *Gibson*, 191 F.3d 1257, 1271 (10th Cir. 1999) ("petitioner has failed to cite any judicial authority, and our independent research revealed none, that the Constitution mandates a 'presumption of life' instruction"); *People* v. *Combs*, 101 P.3d 1007, 1038 (Cal. 2004); *Brown* v. *State*, 890 So.2d 901, 920 (Miss. 2004); *State* v. *Langley*, 711 So.2d 651, 667 (La. 1998); *Davie* v. *Mitchell*, 291 F.Supp.2d 573, 622 (N.D. Ohio 2003); *Slaughter* v. *Parker*, 187 F.Supp.2d 755, 815 (W.D. Ky. 2001).

CONCLUSION

The judgment of the Supreme Court of Kansas should be vacated and the case remanded for further proceedings.

Respectfully submitted,

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